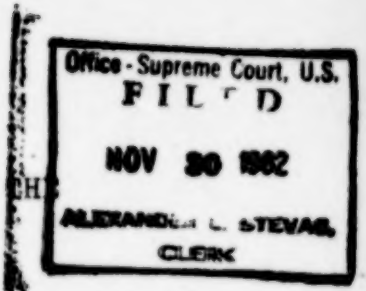

NO. 82-796

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

JESSE BENJAMIN STONER,

PETITIONER

V.

STATE OF ALABAMA,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND COURT OF
CRIMINAL APPEALS OF ALABAMA

BRIEF AND ARGUMENT IN OPPOSITION TO THE WRIT

OF

CHARLES A. GRADDICK
ATTORNEY GENERAL

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
250 Administrative Building
64 N. Union Street
Montgomery, Alabama 36130
(205) 834-5150

ATTORNEYS FOR RESPONDENT

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ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

1. Does the Decision and opinion of the Court of Criminal Appeals of Alabama conflict with any prior controlling decision of this Honorable Court:

A. As to the distinction between the "right" to be speedily prosecuted and the right to be speedily tried once a prosecution is initiated?

No.

B. As to the proposition that delay between a crime and the initiation of prosecution which is neither willful nor unreasonable nor prejudicial to the accused does not reach constitutional proportions?

No.

2. Was the Petitioner denied equal protection of the laws by the Alabama Courts' refusal to hold that this Honorable Court's decision in Furman v.

Georgia (408 U.S. 238 [1972] ipso facto placed a three year statute of limitations on the state statutory offense of setting off dynamite dangerously near an inhabited dwelling? No.

PARTIES

In the Honorable Circuit Court of Jefferson County, Alabama, the Court of Criminal Appeals and the Supreme Court of Alabama, the parties were Jessie Benjamin Stoner, also known as Jesse Benjamin Stoner and J. B. Stoner, Petitioner herein, and the State of Alabama, Respondent herein.

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OPINIONS BELOW

The decision and opinion of the Court of Criminal Appeals of Alabama affirming the Petitioner's conviction is reported as follows:

Stoner v. State, (Cr. App. Ala., 1982) 418 So. 2d 171

The order of the Supreme Court of Alabama denying the Petitioner a writ of certiorari is reported as follows:

Ex parte: Stoner; In re: Stoner v. State, (S. Ct. Ala., 1982) 418 So. 2d 184

JURISDICTION

The Petitioner has invoked this Honorable Court's Jurisdiction under 28 U.S.C. 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner is advancing an alledged claim under the Fourteenth Amendment to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

Title 15, Section 219, Code of Alabama, 1940, which reads as follows:

> "§219. Offenses as to which there is no limitation. -There is no limitation of time for any public offense which may be punished capitally, or for murder in the second degree, manslaughter in the first degree, arson, forgery, counterfeiting, or any offense expressly punishable, under the provisions of this Code, as forgery or counterfeiting." (Title 15, Code of Alabama 1940)

STATEMENT OF THE CASE

The Petitioner, Jessie Benjamin Stoner, also known as Jesse Benjamin Stoner and J. B. Stoner, was indicted for the setting off of dynamite or other explosive in, under or dangerously near the dwelling house of Mack E. Roberson[1] by the Grand Jury of

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[1] "§123. Exploding or setting off dynamite; penalty for.-Any person who wilfully sets off or explodes any dynamite or other explosive in, under or dangerously near to any steam boat or vessel or railroad car in which there is at the time any human being, or any prison or jail or any other house or building which is occupied by a person lodged therein or any inhabited dwelling house or any house adjoining such house whether there is at the time in such house adjoining a dwelling house a human being or not shall on conviction be punished at the discretion of the jury by death or by imprisonment in the penitentiary for not less than ten years." (Title 14, Code of Alabama, 1940)

Jefferson County, Alabama, at its September, 1977, Session. (R. pp. 463-464)

On January 11, 1980,[2] the Petitioner was arraigned on the indictment and pleaded not guilty. February 8, 1980, was set as the trial date. (R. p. 467)

On February 6, 1980, the Petitioner filed a plea in abatement attacking the form of the indictment and raising the statute of limitations. On the same date the Petitioner filed a "Plea in bar" alledging a denial of speedy trial under the Fifth, Sixth and Fourteenth Amendments and alleging intentional delay in presenting the case to Grand Jury.

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[2]The delay was occasioned by Petitioner's resistance to extradition from Georgia. See Stoner v. Hutson, 244 Ga. 52, 257 S. E. 2d 539 (1979), cert. den. 444 U.S. 967, 62 L. Ed. 2d 379, 100 S. Ct. 445.

After a hearing these motions were overruled. (R. pp. 2-40 and 468-482)

The cause came on for trial on May 12, 1980, before Honorable Charles R. Crowder, a Circuit Judge, and a jury. The Petitioner was attended by his attorneys, Honorable Elno A. Smith, Jr., Honorable Robert R. Creel and Honorable Travis Buckley. The State was represented by Honorable Earl C. Morgan, District Attorney, Honorable Burton Dunn, Assistant District Attorney and Honorable John A. Yung IV, Assistant Attorney General. On hearing the evidence, arguments and charge of the Court, the jury returned a verdict of guilty and a sentence of ten (10) years imprisonment. The Petitioner was adjudged guilty and sentenced in accordance with the verdict on May 14, 1980, and gave notice of appeal at the same time. (R. pp. 509-510)

On June 5, 1980, the Petitioner moved for a new trial, the same being denied on September 10, 1980. (R. pp. 514-522)

On April 20, 1982, the Court of Criminal Appeals of Alabama affirmed the Petitioner's conviction. On the matters at issue here the appellate court expressly relied on and followed this Honorable Court's decisions in United States v. Marion, (404 U.S. 307, 30 L. Ed. 2d 468, 92 S. Ct. 455 [1971]) and United States v. Lavasco, (431 U.S. 783, 52 L. Ed. 2d 752, 97 S. Ct. 2044 [1977]) The Court of Criminal Appeals found no denial of due process in the pre-indictment delay because it was not intentional nor unreasonable. On the issue of prejudice to the Petitioner, the Court of Appeals found that the evidence

allegedly lost by the passage of time consisted of either "rank heresay" (418 So. 2d 171, 180), evidence that actually was incriminating and alibi evidence. The alibi evidence was irrelevant in this case since it was never suggested that the Petitioner actually placed the bomb at the church near Mr. Roberson's house. Stoner v. State, (Cr. App. Ala., 1982) 418 So. 2d 171.

The Court of Criminal Appeals denied Stoner's application for rehearing on May 18, 1982. Ibid.

The Supreme Court of Alabama denied Stoner's petition for a writ of certiorari on August 13, 1982. Ex parte: Stoner, (S. Ct. Ala., 1982) 418 So. 2d 184

STATEMENT OF THE FACTS

The evidence on which this Petitioner was convicted is well analyzed in the opinion of the Court of Criminal Appeals of Alabama, which is before this Honorable Court. Stoner v. State, (Cr.App. Ala., 1982) 418 So. 2d 171. Rather than burden the record with another recital, the Respondent State will limit itself to the facts relating to the issues presented.

Sometime after July of 1958, the information produced by the Birmingham Police Department's investigation was turned over to the United States Justice Department. (R. pp. 279)

After turning the matter over to the Federal Justice Department, the Birmingham Police Department directed its main energies elsewhere, but the investigation into the church bombing was

never closed. The City Fire Marshall's Office continued the case; Fire Marshall Aaron Rosenfeld visited the scene of the bombing many times over the years, the last time a year or two before the trial. (R. p. 188) The Birmingham Police Department also continued its investigation. Detective Cantrell, who testified at trial, and Detective Legrande, who died shortly before the trial, had been involved in what they considered an "ongoing report" for five years before trial, and Cantrell had no idea how long the investigation had been going on before then. (R. pp. 188 and 208-209)

The Petitioner submitted several affidavits and one letter in an effort to show prejudice to him.

The Petitioner's affidavit as to what Mark Richard Bolling, deceased, would testify if he had been available can be summerized as follows: Around the time of the bombing the Petitioner allegedly made several statements to the effect that he, the Petitioner, knew that Hugh Morris was an "enemy agent" (i.e. a police informer) and that he, the Petitioner, was trying to prove entrapment, find out what Morris was up to and possibly collect $2,000.00 for doing nothing. The affidavit also alledges that a meeting occured between Bolling, Morris and the Petitioner in which Morris allegedly admitted bombing the church "..to convince J. B. Stoner [the Petitioner] to trust him (Hugh Morris)...." (R. p. 554) The affidavit does not suggest that the Petitioner in

anywise protested or took issue with Morris' alleged statement. Finally, although no one has any idea who actually placed the bomb at the church, Bolling would allegedly have vigorously protested his innocence in the affair. (R. pp. 551-557)

A letter, Defense Exhibit 6, states that the Petitioner's employer no longer has records dating back to 1958 which might throw light on the Petitioner's whereabouts on the date of the bombing. (R. p. 558)

The Petitioner's affidavit concerning the alleged testimony of Ralph Barron, deceased, was to the effect that in early May, 1958, Morris allegedly came to Barrons' service station and made inquiries entirely consistant with Morris informer's status, later when the

incident was recounted to the Petitioner, ha, the Petitioner, allegedly stated that he knew that Morris was an informer. (R. pp. 559-560)

The Petitioner also submitted two affidavits by him to the effect that two deceased persons would have provided him with an alibi for the date of the bombing. (R. p. 561-563)

ARGUMENT

I.

ON PRE-INDICTMENT DELAY

The Petitioner claims conflicts between the decision of the Court of Criminal Appeals and the decisions of this Honorable Court and other courts. Most of these cases are speedy trial cases, and this Honorable Court has held that the right to a speedy trial does not attach until the accused is indicted or arrested. United States v. Marion, 404 U.S. 307, 30 L. Ed. 2d 468, 92 S. Ct. 455 (1971); United States v. Lavasco, 431 U.S. 783, 52 L. Ed. 2d 752, 97 S. Ct. 2044 (1977); United States v. McDonald, ____ U.S. ____, 71 L. Ed. 2d 696, 102 S. Ct. _____ (1982) The Alabama Courts followed this Court's teachings in these cases.

Rather than burden this Honorable Court with a lengthy discussion distinguishing obviously distinguishable cases, the Respondent State will discuss only one case which is in apparent conflict with the holding of the Alabama Courts: Leonard v. Hay, (S. Ct. W. Va, 1980) 269 S.E. 2d 394 (Note: The Petitioner cites this case as "State v. Hay")

An examination of Leonard is very useful in judging the alleged conflicts between this Court's prior holdings and that of the Alabama Courts in this case, because Leonard unlike most of the other cases relied on by the Petitioner involved exclusively pre-indictment delay and the Court held in the accused's favor. However, in so holding the West Virginia Court expressly rejected this Court's holdings in Marion (supra) and Lavasco (supra) and decided the case

under Dickey v. Florida,[3] a classic speedy trial case predating Marion and Lavasco. The Supreme Court of West Virginia expressly refused to decide the case under the Federal Constitution and followed West Virginia law instead.[4] Later West Virginia cases have underscored Leonard's speedy trial approach to pre-indictment delay. In State v. Maynard, ([S. Ct. W. Va., 1982] 289 S. E. 2d 714) and State v. Ayers, ([S. Ct. W. Va., 1981] 282 S. E. 2d 876) the Court quite seriously applied the

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3"...Dickey v. Florida, 398 U.S. 30, 90 S. Ct. 1564, 26 L. Ed. 2d 26 (1970) is more in point...." (269 S. E. 2d 394, 397)

4"...we need not interpret federal law to define due process or Sixth Amendment rights because we have our own state due process and speedy trial provisions...." (269 S. E. 2d 394, 397)

Leonard rule to pre-indictment delays of only a few months.[5] Even West Virginia's speed trial rule is a departure from that taught by this Honorable Court. For example, in Sigman v. Whyte, ([S. Ct. W. Va., 1980] 268 S. E. 2d 603) the Court cited Leonard for the proposition that:

> "The passage of time alone will make it impossible to proceed with criminal charges..." (Emphasis supplied)

Compare Barker v. Wingo, (407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 [1972]) holding that in post-indictment speedy trial issues the length of the delay is a triggering device (407 U.S. 514, 530, 33 L. Ed. 2d 101, 117) and one of four

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[5]Obviously, West Virginia would be greatly hindered in running the long range undercover operations against orgainized crime or public coruption which prove so successful elsewhere.

co-equal factors by which speedy trial is measured. If the decision of the Alabama Courts in this case conflicts with Leonard it is because Alabama unlike West Virginia follows the teachings of this Honorable Court on both pre-indictment and post-indictment delay.

As this Honorable Court has recognized in Marion (supra), Lavasco (supra) and McDonald (supra), there are vast differences between pre-indictment and post-indictment delay. Once an accused is formally charged either by indictment or arrest, he has the right to a speedy trial. Dillingham v. United States, 432 U.S. 64, 46 L. Ed. 2d 205, 96 S. Ct. 303 (1975). But, no one has the right to be arrested or prosecuted. Hoffa v. United States, 385 U.S. 293, 17 L. Ed. 2d 374, 87 S. Ct. 408 (1966). The right to decide if and when to institute

a prosecution is in the prosecutor. The Confiscation Cases, 7 Wall 454, 19 L. Ed. 196 (1869); United States v. Cox, (5th Cir. 1965) 342 F. 2d 167, cert. den. sub. nom: Cox v. Hauberg, 381 U.S. 935, 14 L. Ed. 2d 700, 85 S. Ct. 1767, both cited with approval in United States v. Nixon, 418 U.S. 683, 693, 41 L. Ed. 2d 1039, 1055, 94 S. Ct. 3090 (1974) See also Bass Anglers, etc. v. U.S. Steel Corp., (S.D. Ala., 1971) 324 F. Supp. 412, Aff'd sub nom Bass Anglers, etc. v. Koppers Co., (5th Cir., 1971) 447 F. 2d 1304. In exercising his or her discretion a prosecutor must balance various factors: Would further investigation strengthen the case or would the delay result in the loss of evidence? Would an institution of proceedings at this point help or hinder efforts to identify co-conspirators. What effect would a prosecution

have on existing undercover operations. Are there alternatives to prosecution? Not the least of these considerations is whether the prosecution has some chance of success. All of these factors must be weighed against the statute of limitations, which in most cases provides an absolute deadline for instituting the prosecution and the proposition that once the prosecution is instituted, the accused's right to a speedy trial attaches.

This much is history: This case arose in the South during the reign of terror instituted by radical lawless groups in opposition to the Civil Rights Movement. Conspiracy, terrorism and bombings each present serious practical problems for any due process system of justice, but in dealing with racist violence during this period Alabama

officials were often confronted with all three together in the same case. Diligent officials were also confronted with a certain degree of public sympathy for and fear of the terrorists, which often surfaced in judges and juries. For example: when months of painstaking work by the Montgomery, Alabama, Police Department produced an arrest for a church bombing, the preliminary hearing judge, over vehement objection by the State, allowed the defendants, to plead guilty to disturbing religious worship and fined them ten dollars each. Several strong homocide cases personally prosecuted by the Attorney General of Alabama as well as the local District Attorneys ended in acquitals. These cases were then successfully prosecuted in Federal Court under the Civil Rights Statutes. Problems also arose as a

result of mistrust and, therefore, lack of co-operation, between state and federal agencies. For example, on September 15, 1963, a bomb detonated at the Sixteenth Street Baptist Church in Birmingham, killing three children. The Birmingham Police and the F.B.I. independently investigated the incident. The F.B.I. found a fishing bobber at the scene but had no idea if or how it related to the case, while the Birmingham Police had a statement from one Robert Edward Chambliss that he knew how to make a bomb timer using a bucket of water and a fishing bobber. It was more than ten years before these two items of evidence were put together to make part of a case against Chambliss. See Chambliss v. State, (Cr. App. Ala., 1979) 373 So. 2d 1185, 1193 & 1200.

It was in this context that the decision to prosecute in this case was first delayed and finally made. With juries returning acquitals in stronger cases there seemed little point in presenting this case to a grand jury, when further investigation might well strengthen it[6] as well as identify the persons who actually placed the bomb. On the other hand, once this prosecution was instituted the undercover operation would of necessity be revealed, ending a means

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[6]Of course, in judging the strength of the State's case the prosecutors could not possibly have known that the Petitioner would strengthen the State's case by (1) admitting his meeting and negotiations with the undercover officers, (2) presenting a ludicrous defense and (3),being one of the nation's most infamous racists and notorious advocates of violence, would sware that he had never advocated personal violence against any segment of society.

of learning about future terrorist activities. Faced with little chance of success in State Court, the state officials submitted their evidence to the Federal Justice Department, for all they knew the F.B.I. had enough other evidence to flesh out the case and obtain a conviction. Then, faced with the fact that the Justice Department never did bring a prosecution and that the 1975 Code of Alabama would impose a statute of limitations forever barring the prosecution, the matter was presented to the Grand Jury and an indictment obtained.

The Learned Trial Judge and the Court of Criminal Appeals found that the delay in presenting the case to the Grand Jury was not the result of an intentional decision and that the case had been held open throughout the period. If the delay

produced little new evidence, this was not something which could have been foreseen; there was reason for the delay. The Court of Criminal Appeals rejected the Petitioner's self serving affidavits as a showing of prejudice but the Court also found that even on their face, these affidavits presented no evidence of prejudice. Obviously, if these witnesses had been alive they would not have been permitted to testify to the Petitioner's self serving declarations. The Petitioner's silence in the face of Morris' alleged statements concerning the bombing would have been an admission against interest; this was incriminating not exculpating evidence. Finally, the Petitioner's alibis were irrelevant, since the Petitioner admitted meeting with the undercover officers and there was never any question that the

Petitioner had actually placed the bomb at the church. The Petitioner has been badly crippled from childhood and had a perfect defense to any suggestion that he physically placed the bomb at the church under the noses of armed guards and ran away. The Petitioner was accused and convicted as an accomplice - one who procurred, assisted or encouraged the bombing. It was not necessary that he be in Birmingham or Alabama or the United States, for that matter, when his co-conspirators placed the bomb.

The Alabama Courts decided this case under the rules laid down by this Honorable Court in cases like United States v. Marion, (404 U.S. 307, 30 L. Ed. 2d 468, 92 S. Ct. 455 [1971]); United States v. Lavasco, (431 U.S. 783, 52 L. Ed. 2d 752, 97 S. Ct. 2044 [1977] and

United States v. McDonald, (____ U.S. ____, 71 L. Ed. 2d 696, 102 S. Ct. ____ [1982]). If the decision of the Alabama Courts conflicts with the holdings of other jurisdictions, it is because these other jurisdictions are following their own law. There is no conflict between the holding of the State Courts in this case and any decision or opinion of this Honorable Court.

III.

ON THE STATUTE OF LIMITATIONS

On June 28, 1958, the statute of limitations applicable to the Petitioner's crime read as follows:

> §219. Offenses as to which there is no limitation. - There is no limitation of time within which a prosecution must be commenced for any public offense which may be punished capitally, or for murder in the second

> degree, manslaughter in the first degree, arson, forgery, counterfeiting, or any offense expressly punishable, under the provisions of this Code, as forgery or counterfeiting." (Title 15, Code of Alabama, 1940) (Emphasis supplied)

Since the Petitioner's crime was capital in 1958, there was no limitation on it. See Title 14, Section 123, Code of Alabama, 1940, quoted at page 3 above. These statutes remained in this same form until the 1975 Code of Alabama went into effect on October 30, 1977.

Now, the Petitioner argues that this Honorable Court's decision in Furman v. Georgia, (408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 [1972]) abolished the capital penalty and erected a three year statute of limitations on his crime. There are several problems with this argument.

First, Furman did not abolish the capital penalty at all but merely disapproved the procedures by which it was administered. See Dobbert v. Florida, 432 U.S. 282, 53 L. Ed. 2d 344, 97 S. Ct. 2290 (1977) In the second place the interpretation and application of state statutes of limitation are matters of state law.

Recognizing the lack of federal question here, the Petitioner seeks to federalize this argument, which was rejected by the State Courts, by claiming that persons who committed the same crime as the Petitioner after Furman would have the benefit of a three year statute of limitations. It could be argued that at the time of his crime the Petitioner's crime could, in the words of the statute, "...be punished capitally...," while after Furman such offenses could not be so punished and that the resulting

discrimination is the sort which always occurs when a statute or rule is changed, as they must be from time to time. However, such an argument need not be made here, because the Petitioner's basic premise just isn't so.

Prior to Furman the Alabama courts did indeed define a "capital crime" and a "capital case" as one in which the death penalty was a possibility. Thus, where a trial for a capital felony resulted in a sentence other than death, the Automatic Appeals Statute did not apply. E.g. Salter v. State, 264 Ala. 473, 88 So. 2d 788, 789 (1956) However, after Furman it became apparent that, while most of the statutes which referred to the capital penalty reflected the legislature's desire for the careful and merciful administration of the ultimate penalty, such was not always the case. In several instances the legislature had simply used

the designation "capital" as a convenient classification of very serious crimes or cases. Obviously, for example, the exclusion of an offense from the statute of limitations was not based on concern for the penalty but on concern for the seriousness of the offense. The issue came before the Alabama Supreme Court in Ex parte: Bynam, (294 Ala. 78, 312 So. 2d 52, 71 A.L.R. 3rd 44 [1975]). Bynum was charged with the same offense as the instant Petitioner. Like the Petitioner, Bynum was indicted after Furman, but unlike the Petitioner, Bynum's crime had also occurred after Furman. Bynum was denied bail on the grounds that his crime was "capital." On habeas corpus Bynum argued that in light of Furman his crime was no longer capital, since the death penalty was not a possible sentence. The Alabama Supreme Court rejected this argument writing:

"...It is the opinion of this Court that the classification theory followed by the majority of states considering this issue is sound and should be adopted. In reaching this decision, we are aware of prior Alabama cases which interpreted the term "capital offense" to mean offenses for which the death penalty may be imposed Lee v. State, 31 Ala. App. 91, 13 So. 2d 585 (1943); Ex parte McCrary, 22 Ala. 65, (1853)[7]

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[7]Beginning at page 19 of the petition the petitioner argues as follows:

"...Also obvious is the proposition that after this Court's ruling in Furman v. Georgia, 408 U.S. 238 (1972), capital felonies as such ceased to exist in Alabama. Such a result necessarily obtains because the Alabama appellate courts had heretofore ruled that no offense can be truly capital unless the death penalty can be imposed. Ex parte, McCrary, 22 Ala. 65, 72; Lee v. State, 13 So.2nd 583 (Ala. App. 1943)..." (Petition pages 19-20)

> But these opinions were not written inthe context of Furman (which deals solely with the matter of constitutionally permissible punishment), and their application to the classification of capital offenses for the purposes of bail is not here decisive. The only effect of Furman was to eliminate the imposition of the death penalty as it was then enforced, and not to eliminate the classification whereby crimes are categorized as capital for purposes other than punishment...." (312 So. 2d 52, 55)

Thus, the Petitioner's argument on this point falls both on the law and the facts.

CONCLUSION

In conclusion the State of Alabama, Respondent, respectfully submits that the decisions and opinions of the Alabama Courts are patently correct and entirely consistent with the decisions of this Honorable Court and that the writ is due to be denied and the Respondent prays such denial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Respondent, do hereby certify that on this ____ day of November, 1982, I did serve the requisite number of copies of the foregoing on the Attorneys for Jesse Benjamin Stoner, Petitioner, by mailing same to them, first class postage prepaid and addressed as follows:

Hon. Travis Buckley
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